October 24, 2018

Before the
Federal Communications Commission
Washington, DC

In the Matter of	**)**	
Rules and Regulations Implementing the	**)**	**CG Docket No. 02-278**
Telephone Consumer Protection Act of 1991	**)**	**CG Docket No. 18-152**

REPLY COMMENTS OF THE NATIONAL COUNCIL OF HIGHER EDUCATION RESOURCES TO THE REQUEST FOR COMMENTS ON INTERPRETATION OF THE TELEPHONE CONSUMER PROTECTION ACT IN LIGHT OF THE NINTH CIRCUIT'S *MARKS V. CRUNCH SAN DIEGO, LLC* DECISION

I. Introduction

The National Council of Higher Education Resources ("NCHER") is responding to the Federal Communications Commission's (the "Commission") public notice request released on October 3, 2018 (the "Public Notice") asking for comments on interpretation of the Telephone Consumer Protection Act ("TCPA") in light of the Ninth Circuit's decision in *Marks v. Crunch San Diego, LLC* (the "Marks Decision"). The Public Notice follows a similar request dated May 14, 2018 asking for comments on interpretation of the TCPA in light of the District of Columbia Circuit's decision in *ACA International v. FCC* (the "ACA international Decision"). NCHER responded to that request by filing both comments[1] and reply comments.[2]

NCHER is a national, nonprofit trade association representing state, nonprofit, and private higher education organizations that help students and parents pay for the costs of postsecondary education. Our membership includes organizations under contract with the U.S. Department of Education (the "Department") to service and recover outstanding loans made under the William D. Ford Federal Direct Loan Program and organizations that service and recover outstanding loans made under the Federal Family Education Loan Program ("FFELP") and private education loans.

[1] Comments of the National Council of Higher Education Resources, CG Docket Nos. 02-278, 18-152 (posted June 14, 2018).
[2] Reply Comments of the National Council of Higher Education Resources, CG Docket Nos. 02-278, 18-152 (posted June 29, 2018).

II. Summary

Since 2015, the Commission and the courts have issued a series of interpretive rulings that have created unnecessary communication barriers for federal and private loan service providers as they attempt to help student and parent borrowers understand their options and repay their postsecondary education obligations. For that reason, NCHER welcomed the ACA International Decision. The Marks Decision takes an opposing position, one that is inconsistent with the statute and its legislative intent. Regulatory clarity is desperately needed to reduce unnecessary confusion and costly litigation which, in light of the Marks Decision, will almost surely increase. In the context of the student loan landscape, the importance of communication with struggling borrowers cannot be overemphasized. We read with interest the comments submitted jointly by the Student Loan Servicing Alliance, Navient Corp., Nelnet Servicing LLC, and the Pennsylvania Higher Education Assistance Agency (the "Joint Comments").[3] These organizations, like many of NCHER's members, are involved in the servicing of federal student loans. NCHER concurs and supports the Joint Comments.

Our reply comments will, first, summarize why the issues raised by the Marks Decision are important to participants in the federal and private student loan programs. Our comments will, then, address several specific comment requests included in the Public Notice.

III. Background – The Importance of Communication in Student Loan Programs

A. The Federal Student Loan Programs Are Large and Growing, As Are Delinquencies and Defaults

The federal student loan programs have grown exponentially over the past decade and include more than $1.412 trillion in outstanding loans made to 42.2 million borrowers.[4] Approximately $201.7 billion of these federal loans are in "default,"[5] according to the Department.[6] Further, the Department reports that more than one in six Direct Loan borrowers in repayment are more than 30 days past due.[7] Nearly ten percent of Direct Loan borrowers in repayment are more than 90 days delinquent.[8] These challenges with student loan debt – as well as larger issues around college affordability - have risen over the last several years. On an almost daily

[3] Comments of the Student Loan Servicing Alliance, Navient Corp., Nelnet Servicing LLC, and the Pennsylvania Higher Education Assistance Agency, CG Docket Nos. 02-278, 18-152 (posted October 18, 2018).
[4] See U.S. Department of Education, Federal Student Aid Data Center, Federal Student Aid Portfolio Summary, https://studentaid.ed.gov/sa/about/data-center/student/portfolio (last visited October 22, 2018).
[5] A student loan becomes "past due" or "delinquent" when a payment is missed. A loan becomes in "default" when it has been delinquent for 271 days. See 34 C.F.R. § 682.411 (outlining due diligence "collection efforts" that lenders must engage in while a FFELP loan is delinquent).
[6] See Department of Education, Federal Student Aid Data Center, Direct Loan and Federal Family Education Loan Portfolio by Loan Status, https://studentaid.ed.gov/sa/about/data-center/student/portfolio (last visited October 22, 2018).
[7] See Department of Education, Federal Student Aid Data Center, Direct Loan Portfolio by Delinquency Status, https://studentaid.ed.gov/sa/about/data-center/student/portfolio (last visited October 22, 2018).
[8] Id.

basis, major media outlets discuss the burden that former student and parent borrowers encounter in repaying their student loans and how it is affecting life decisions such as starting a family, buying a home, or saving for retirement.

B. Servicers and Collectors Have Tools to Help Borrowers

As NCHER has pointed out in previous filings,[9] the federal student loan programs, particularly their loan repayment options, have become increasingly complex over the last decade. While unique among consumer credit programs because they allow students and parents to borrow large sums of money without showing credit-worthiness or an ability to pay, the federal student loan programs include many features designed to address personal circumstances and to help distressed borrowers faced with loan collection. However, eligibility qualifications are confusing for borrowers as each plan has its own set of requirements, and federal law requires borrowers to update their financial and demographic data on an annual basis to stay enrolled in an income driven repayment plan. Unfortunately, many borrowers still fall into delinquency and default without accessing these increasingly complex options. As reinforced by the Department, "when borrowers fall into delinquency, federal student loan servicers must be able to proactively reach out to them to make them aware of their options and to help them access the repayment plan that best suits their needs."[10]

C. Live Communication with Borrowers are Needed

Many of the student and parent borrowers who are eligible for federal repayment assistance are unaware of the options available to them under the law and successfully access these programs only if they can be reached by their loan servicer or collector. This is why live two-way phone conversations are extremely important. However, individuals within the age groups of typical student loan borrowers are quickly abandoning traditional telephone landlines and moving exclusively to cellular telephones. This is a critical point, since the Commission's prior rules and guidance place limitations on using current technology to efficiently reach borrowers on their cell phones, unnecessarily stifling live communication. The Marks Decision will have the same effect. According to a recent study from the Centers of Disease Control and Prevention, over one-half of American homes (53.3 percent) had only wireless telephones during the second half of 2017. The percentage is even higher for those age brackets more likely to have

[9] See, for example, NCHER's Comments filed in response to the Commission's May 14, 2018 Public Notice, CG Docket Nos. 02-278, 18-152 (posted on June 14, 2018).

[10] July 20, 2016 Memorandum on Policy Direction on Federal Student Loan Servicing from Ted Mitchell, Under Secretary of Education, p. 14. Many private education loan programs have similar repayment assistance programs for their borrowers, and would likewise benefit from multiple call attempts to help them repay their financial obligations. For example, state and nonprofit lenders offer their residents repayment options tied to their income, similar to the structure in the federal program. Also, Congress recently passed, and the President signed into law, the Economic Growth, Regulatory Relief, and Consumer Protection Act (Public Law 115-174), which allows private student loan borrowers who are in default to rehabilitate their loans and have the default record stricken from their credit report, like the federal rehabilitation program. Private loan borrowers should receive the same assistance from their service providers available to federal borrowers.

student loans – three-fourths of adults aged 25–29 (75.6 percent) and aged 30-34 (73.3 percent) live in households with only wireless telephones.[11]

The value of live contact with student and parent borrowers is demonstrated by a recent survey conducted for NCHER using data from four guaranty agencies that participate in the FFELP. Using randomly-selected past call data, the four agencies from distinct regional markets within the U.S. compared the outcomes of delinquent borrowers who either had or had not participated in at least one live telephone conversation with the guaranty agency or its servicer. The results, summarized below, show significantly better outcomes for borrowers who had at least one live telephone conversation with their service provider.

NCHER Live Phone Contact Survey Summary of Preliminary Data		Percent Cured	Average Number of Call Attempts
GA #1	No live contact	53.70%	14
	Live contact	66.80%	15
GA #2	No live contact	60.30%	25
	Live contact	82.90%	27
GA #3	No live contact	52.06%	61
	Live contact	79.78%	61
GA #4	No live contact	73.61%	333
	Live contact	88.44%	368

Further, one of the large federal student loan servicers, Navient Corp., states that it is able to help resolve delinquencies and prevent default more than 90 percent of the time that it has a live conversation with a borrower. Conversely, 90 percent of the borrowers who default on their federal student loans never had a live conversation with Navient, despite its efforts to reach them. The company also reported that it was able to increase successful income-driven repayment (IDR) plan enrollment by 50 percent through outreach to previously delinquent borrowers' cell phones.[12]

[11] Jeannine S. Schiller, Tainya C. Clarke, and Tina Norris. Wireless substitution: Early release of estimates from the National Health Interview Survey, July –December 2017. National Center for Health Statistics. December 2017. Available at: https://www.cdc.gov/nchs/data/nhis/earlyrelease/EarlyRelease201803_about.pdf.

[12] Comments of Navient Corp., CG Docket No. 02-278, at 9-10 (filed June 6, 2016). See also the June 12, 2016 letter from Jack Remondi, President and Chief Executive Officer of Navient Corp., to the Consumer Financial Protection Bureau, filed in response to the Bureau's Request for Comments Regarding Student Loan Borrower Communications, CFPB Docket No. CFPB -2016-0018, p.1.

IV. NCHER's Responses to Specific Comment Requests Relating to the Impact of the Marks Decision.

The TCPA prohibits the making of any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system ("ATDS") or an artificial or prerecorded voice device. The statute defines an ATDS to be equipment which has the capacity — (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.[13]

Contrary to the plain meaning of the statute, the Ninth Circuit in its Marks Decision takes the position that the definition of an ATDS is not limited to devices with the capacity to call numbers produced by a "random or sequential number generator," but also includes devices with the capacity to dial stored numbers. The decision states that "we read §227(a)(1) to provide that the term automatic telephone dialing system means equipment which has the capacity – (1) to store number to be called **or** (2) to produce numbers to be called, using a random or sequential number generator – and to dial such numbers"[14] (emphasis added). The Court's placement of the "or" has the effect of amending the statutory definition, with the result being that any device that stores numbers and is used in the placement of a call or text becomes an autodialer. In the statutory text, the second half of part (A) – "using a random or sequential number generator" – is preceded by a comma, which should be interpreted as pertaining to the entire phrase before the comma. Due to concerns over potential liability, the Marks Decision could take communication back to the days of the rotary phone. We note that much of the discussion in the early part of the Marks Decision focuses on the protection of residential phone subscribers from unsolicited telemarketing calls. The decision itself acknowledges this legislative history, quoting a U.S. House of Representatives Report that points out consumer frustration with "phone calls from a computer trying to sell something."[15] Informational calls made by student loan servicers and collectors are not telemarketing calls. Our members agree that telemarketing calls should be restricted, but informational calls should not face similar restrictions.

As explained in Part III of these Reply Comments, it is hard to argue that consumers do not – and would not – benefit from these informational calls. We ask the Commission to clear up the conflict between the Ninth Circuit's decision in *Marks* and the District of Columbia Circuit's decision in *ACA International* (as well as the Third Circuit's decision in *Dominguez ex rel. Himself v. Yahoo, Inc.*). In this regard, it is important to note that the Marks Decision is not binding on the Commission, while the ACA International Decision is binding because it resulted from the DC Circuit's review of the Commission's 2015 Declaratory Rule and Order (the "2015 Order").

In the Marks Decision, the Court also rejected the defendant's argument that a device cannot qualify as an ATDS unless it is fully automatic, meaning that it must operate without any human

[13] 47 U.S.C. § 227 (b)(1)(A).
[14] *Marks v. Crunch San Diego LLC*, 9th Circuit Ct. of Appeals, p. 5 (quoting House Report No. 102-317, p. 9).
[15] Id.

intervention whatsoever.[16] The Commission should clarify that the absence of human intervention is what makes an automatic telephone dialing system automatic and that, if human intervention is involved, then the equipment is not an ATDS.

The Commission also seeks comment on what devices "have the capacity to store numbers." The common-sense interpretation of this phrase would encompass present ability. The statute uses the present tense term – "has the capacity" – in defining an ATDS. The 2015 Order took an expansive view of what constitutes capacity, holding that a device has the capacity to perform the functions required to be an ATDS so long as it could perform such functions by modifying the device or its software. The DC Circuit overturned this part of the 2015 Order, holding it arbitrary and capricious. We support this view. Otherwise, and since almost any modern telephonic device could be modified to perform the function, the set of qualifying devices would be almost limitless. In this regard, we note that the TCPA makes no mention of potential capabilities, but rather states that, under the statute, an ATDS is limited to equipment that "has the capacity" to perform the ATDS functions. The ambiguity attributable to the 2015 Order has spawned unnecessary confusion and costly litigation. As noted above, the Marks Decision will accelerate this trend unless the Commission steps in. Regulatory clarity is needed in these important cases.

In its response to the Public Notice, the National Consumer Law Center spends seven pages arguing that the Commission should deal separately with smart phones.[17] By doing so, the organization acknowledges that the ATDS definition it advances is limitless. We recommend that the Commission stay within the plain meaning of the statute, a meaning that is fully in accord with legislative intent. Finally, we support the comments filed by the U.S. Chamber Institute for Legal Reform that to be implicated in the TCPA prohibition a call must be made using the ATDS capability.[18] If a call is made using non-ATDS functionality, it should not be covered by the TCPA restriction. A call, in this case, would be no different than a call made by equipment that did not have ATDS capability.

IV. Conclusion

The Commission's previous interpretation of the TCPA has fostered a flood of litigation, which has been costly for well-intentioned businesses and prevented them from communicating with their customers for legitimate business purposes. While the statute was enacted to stop abusive telemarketing, its prior implementation by the Commission and some courts has ended up being a barrier that prevents businesses from making informational calls to their customers. These court decisions (including the Marks Decision) confirm the need for the Commission to act now to establish a clear standard consistent with the statute. In Part III of these Reply Comments, NCHER has laid out in detail the reasons why, in the context of the servicing and

[16] Id., p. 23.

[17] Comments of the National Consumer Law Center, CG Docket Nos. 02-278, 18-152 (posted on October 18, 2018), pp. 7-13.

[18] Comments of the U.S. Chamber Institute for Legal Reform, CG Docket Nos. 02-278, 18-152 (posted on October 18, 2018), p. 19.

collection of federal and private education loans, this barrier has been harmful to student and parent borrowers. NCHER appreciates the Commission's interest in taking a renewed look at some of the misguided provisions of the 2015 Order and the Marks Decision that have proven harmful to student loan borrowers. These borrowers want and need timely and accurate information to better manage their student loan debt and avoid delinquency and default, and to rehabilitate loans that have defaulted. We encourage the Commission to move forward with this important initiative, and stand ready to be of assistance in this effort.

Sincerely,

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